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No. 721

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

FRANCIS DeROSA,

Petitioner,

vs.

ELMER J. SCHNACKENBERG, ROGER S. KILEY and LUTHER M. SWYGERT, Circuit Judges,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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November, 1965

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INDEX

	PAGE
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons Why the Writ Should Be Granted	5
Conclusion	8
Appendix:	
Court of Appeals Opinion	1a
Judgment Order of Court of Appeals	6a
Order of Court of Appeals Denying Petition for Rehearing	7a
Order of the Supreme Court of the United States, Justice Tom C. Clark Extending Time for Filing Petition for Writ of Certiorari	8a
Rule 52, Federal Rules of Civil Procedure	9a

CITATIONS.

CASES:

Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44 (1958)	6
American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S. 2d 393 (1954)	7
Century Indemnity v. Serafine, 311 F2d 676 (CA 7, 1963)	3
De Rosa v. Aetna Insurance Company, 346 F2d 245 (CA 7, 1965)	2

PAGE

Duffy v. Fort Dearborn Cas., 270 Ill. App. 143 (1933) 6

Gregory v. Highway Ins. Co., 24 Ill. App. 2d 285 (1960) 6

Kankakee Auto Leasing v. Hemphill, 21 Ill. App. 2d 179 (Abst.) (1959) 6

Panczko for the Use of Enright v. Eagle Indemnity Co., 346 Ill. App. 144 (1952) 6

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FRANCIS DeROSA,

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vs.

ELMER J. SCHNACKENBERG, ROGER S. KILEY and LUTHER M. SWYGERT, Circuit Judges,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Francis DeRosa an Illinois citizen, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter the "Court of Appeals") entered May 24, 1965 which reversed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, without remanding, and its subsequent order denying rehearing.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is reported under the title *DeRosa* v. *Aetna Insurance Company* (1965) 346 F. 2d 245, and is printed in the appendix hereto (A. 1a). A related opinion is *Century Indemnity Co.* v. *Serafine* (CA 7 1963) 311 F. 2d 676.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 24, 1965 (A. 6a). The order denying rehearing was entered on July 6th, 1965. (A. 7a). A timely application for extension of time to file a petition for Writ of Certiorari was presented to the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit and his order granting an extension to November 3rd, 1965 was entered on October 4, 1965 (A. 8a).

QUESTIONS PRESENTED.

1. May a Court of Appeals simply ignore an aspect of a case which has colored the history of the litigation and which has been briefed and argued by the parties on appeal, thereby denying to a party effective appellate review?

2. May a Court of Appeals, by its negative action in ignoring an important aspect of a case, effectively decide that aspect of the case in clear contradiction of prevailing State law?

STATUTES INVOLVED.

Rule 52, Federal Rules of Civil Procedure (A. 9a).

STATEMENT OF THE CASE.

This is a personal injury case with a long and complicated history. Century Indemnity (the predecessor of Aetna Insurance Company) insured Serafine. DeRosa was injured while riding a horse owned by Serafine. A year after the injury, DeRosa sued Serafine in the Superior Court of Cook County. Century declined to defend Serafine on the ground of late notice, and retained attorneys who filed a declaratory judgment action in the United States District Court seeking to avoid its obligations under the insurance policy.

In preparation for the declaratory judgment action, Century took a statement of Serafine, and its attorneys caused Serafine's deposition to be taken. The declaratory judgment action went to trial, during which Serafine testified. This trial resulted in judgment for Serafine, the insured, and against Century, the insurer, which judgment was appealed by Century and affirmed by the Court of Appeals for the 7th Circuit under the title *Century Indemnity Company* v. *Serafine,* 311 F. 2d 676 (7th Cir., 1963). In apparent compliance with the judgment of the Court of Appeals, Aetna (successor to Century) caused its attorneys to appear in the Superior Court of Cook County as attorneys for the defendant, Serafine, in the action commenced by DeRosa.

In preparation for the trial of the cause of *DeRosa* v. *Serafine,* Aetna's attorneys did nothing. Subsequently, when said cause was reached for trial, Aetna's attorneys notified Serafine of the trial, and of the fact that they desired his attendance and testimony. He referred them

to his personal attorneys, who had defended him against Aetna's attorneys in the prior declaratory judgment proceedings.

A holiday weekend intervened, during which Serafine was out of the City. The attorney for DeRosa, at expense to himself, located Serafine and caused him to be subpoenaed as a witness in the trial. Serafine did appear and did testify as an adverse witness under Illinois procedure, and did take the stand as a witness in his own behalf when called by Aetna's attorneys who were ostensibly defending him.

After a verdict in the Superior Court in favor of DeRosa and against Serafine, Aetna's attorneys filed a second declaratory judgment action alleging lack of cooperation by Serafine in his alleged failure to appear and to testify in the Superior Court trial. These were the same attorneys who had filed the previous declaratory judgment action, taken the prior appeal to the Court of Appeals, and then appeared in the Superior Court of Cook County as attorneys for Serafine!

It is this second declaratory judgment action which has been reviewed in the Court of Appeals and is now presented to this Court on this Petiton for Writ of Certiorari.

The relief sought by Aetna in the second declaratory judgment action was denied and the cause went to trial on the counterclaim of DeRosa for a declaration that Aetna owed DeRosa the amount of the judgment in the Superior Court. The District Judge entered judgment in accord with DeRosa's counterclaim and the Court of Appeals reversed without remanding for the sole reason that in the opinion of the Court of Appeals, Serafine had not complied with the policy provisions requiring his cooperation with the insurer due to his failure to respond to their attorneys' request to appear and testify. Contrary to what is referred to in the opinion as the "implied finding" of the trial.

REASONS WHY THE WRIT SHOULD BE GRANTED.

For the following reasons this Court should exercise its sound judicial discretion and grant the Writ:

I.

THE DECISION OF THE COURT OF APPEALS TOTALLY IGNORES AN IMPORTANT AND UNRESOLVED ASPECT OF THIS CASE, THUS EFFECTUALLY DEPRIVING PETITIONER OF APPELLATE REVIEW ON THAT ASPECT OF THE CASE.

The history of this case reveals the conflict between Aetna and its insured from the very beginning.

At the inception of the litigation between DeRosa and Serafine, the insurer declined a defense to the insured. The insurer then took the insured's statement, and retained attorneys who filed an action seeking to avoid any obligation to the insured. Certainly, at this point, both the insurer and its attorneys were in obvious and open conflict of interest with the insurer. The action so filed resulted in the taking of the insured's deposition and his testimony on trial with all of the concomitant cross examination, argument and bitterness engendered in such a conflict.

After an adverse decision in the trial court, the insurer continued its efforts to avoid its obligation to the insured in the Court of Appeals, where it was again unsuccessful.

The next time the insured heard from his insurer, which had now been ordered by the Court of Appeals to defend him, was when the cause originally giving rise to their conflict was on trial and he received a phone call from the same attorneys who had previously been so bitterly antagonistic to him.

It is apparent throughout the entire record of this cause that there was ample reason for Serafine's reluctance to comply with any request from these attorneys.

Yet, this reluctance is the basis of the opinion and judgment of the Court of Appeals which ignored the history of this litigation, the arguments advanced by this Petitioner in his Brief and Petition for Rehearing in the Court of Appeals, decided the cause without reference to this important aspect of it, and reversed the experienced trial judge who had heard the testimony and seen the witnesses.

The effect of the opinion and judgment of the Court of Appeals is a decision that the good faith of the insurer is of no importance when the question of the insurer's cooperation is raised.

II.

THE COURT OF APPEALS IN EFFECT HAS RENDERED A DECISION ON AN IMPORTANT STATE QUESTION IN CONFLICT WITH THE CLEAR ILLINOIS LAW.

The Illinois cases have been uniform in holding that when the cooperation clause of an insurance policy is construed, good faith is required on the part of both insurer and insured. *Kankakee Auto Leasing* v. *Hemphill,* 21 Ill. App. 2d 179 (Abst.) (1959); *Panczko for the Use of Enright* v. *Eagle Indemnity Co.,* 346 Ill. App. 144 (1952); *Gregory* v. *Highway Ins. Co.,* 24 Ill. App. 2d 285 (1960); and *Duffy* v. *Fort Dearborn Cas.,* 270 Ill. App. 143 (1933).

And, in Illinois, an insurer has been held to waive its right to urge lack of cooperation by its own bad faith where there was a conflict of interest between the insured and the insurer and the insured's attorneys represented both parties. *Allstate Insurance Co.* v. *Keller,* 17 Ill. App. 2d 44 (1948). The Illinois Appellate Court in that case

quoted from *American Employers Ins. Co.* v. *Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S. 2d 393 (1954), as follows:

> "The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier. Canons 6, 45, Appendix, McKinney's Judiciary Law. If the interests of the carrier and the assured are or are likely to become diverse, he cannot represent both. 'Divided obligations in trust relations are obnoxious to the law, and in none more so than in that of attorney and client.' *People* v. *People's Trust Co.*, 180 App. Div. 494, 167 N.Y.S. 767, 768."

And the Illinois Appellate Court went on to say in its own language:

> "Where an insurer's attorney has reason to believe that the discharge of his duties to his client, the insured, will conflict with his duties to his employer, the insurer, it becomes incumbent upon him to terminate his relationship with the client. *Reynolds* v. *Maramorosch*, 208 Misc. 626, 144 N.Y.S. 2d 900 (1955); *Helm* v. *Inter Insurance Exchange*, 354 No. 935, 192 S.W. 2d 417 (1946); *Hammett* v. *McIntyre*, 114 Cal. App. 2d 148, 249 P. 2d 885 (1952)."

It is respectfully and earnestly submitted that the Court of Appeals, by ignoring the entire history of the bitter antagonism between Aetna's attorneys and Aetna's insured, has failed to give effect to the many explanations in the record for any apparent failure of the insured to cooperate with the insurer and has in effect rendered a decision flatly contradictory to controlling Illinois law.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this Court grant the Writ of Certiorari requested by the Petitioner.

Respectfully submitted,

JOHN G. PHILLIPS
Counsel for Petitioner

JONES & CLARK,
VINCENT M. CLARK,
Of Counsel

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14757
FRANCIS DEROSA,
Counter-Plaintiff, Appellee,
v.
AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 24, 1965

Before SCHNACKENBERG, KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, Circuit Judge. This is an appeal from a judgment in favor of counter-plaintiff Francis DeRosa against counter-defendant Aetna Insurance Company for $25,000. In a prior state court action DeRosa had recovered a judgment for this amount against Dan Serafine, the insured under a policy of casualty insurance issued by The Century Indemnity Company. In his suit against Serafine, DeRosa claimed that his back had been injured on November 20, 1957, while riding a horse owned by Serafine.

Although the accident occurred in 1957, Serafine did not inform Century until 1959 that DeRosa was asserting a claim against him. After the state court action was

instituted in March, 1959, Century filed an action in the federal district court for a declaratory judgment that it need not defend Serafine, its insured, because of his untimely notice of the claim asserted against him. The district court found against Century and this court affirmed. *Century Indem. Co.* v. *Serafine*, 311 F.2d 676 (7th Cir. 1963).

Following the termination of the federal court declaratory action, Aetna, successor to Century, undertook Serafine's defense in DeRosa's case against him in the Superior Court of Cook County, Illinois. In that proceeding, after a jury trial, DeRosa recovered a judgment against Serafine for $25,000. Thereafter, Aetna filed the present declaratory judgment action in the federal district court, requesting that it be absolved from liability under its policy because of Serafine's failure to cooperate in the trial in the state court. DeRosa moved to dismiss the complaint on the ground that the issue was res judicata and on the further ground that the issue could be resolved in a garnishment action against Aetna by DeRosa. The motion to dismiss was granted. At the same time DeRosa filed a counterclaim under three separate theories: garnishment, recovery under the Insurance Code of Illinois, and recovery under the terms of the policy. Following a trial on the counterclaim, the district court entered judgment ordering that DeRosa recover from Aetna the full amount of the judgment which he had obtained against Serafine in the state court.

Aetna appeals on two bases: (1) that the evidence before the court proved that Serafine did not cooperate with counsel in defending the DeRosa suit, thus breaching a condition of the policy which required him to assist in the conduct of the defense and (2) that the district court erred in refusing to allow Aetna to present certain evidence which would have constituted further proof of DeRosa's failure to cooperate.

The evidence before the district court showed that on May 27, 1963, the law firm representing Serafine under the policy with Aetna telephoned him that the case in the

Superior Court of Cook County was going to trial and asked him to attend. Serafine said that he was leaving town and could not be present. He suggested that if the law firm wanted to pursue the matter further, it should contact his personal attorney. A phone call to Serafine's attorney did not produce the cooperation of the insured or his attendance at the trial. Aetna offered to prove that Serafine's personal attorney said that he would look into it. Aetna also made an offer of proof that when reminded of Serafine's duty of cooperation and attendance at trial, the attorney replied, "We have gone into that issue before." The judge refused both offers.

DeRosa's case against Serafine was assigned for trial on May 28, 1963, and evidence began on May 29. Serafine did not communicate with the lawyers furnished by Aetna to defend him until he appeared in the court on the morning of June 3. He was in the company of DeRosa's attorney and became the last witness for the plaintiff.

We think these facts alone are sufficient to show such a failure on the part of Serafine to cooperate with his insurer as to preclude Aetna from liability for the judgment against its insured. Having made this determination, we need not rule on the alleged error of the district court in failing to admit additional evidence of Serafine's conduct.

Under Illinois law, the general rule of garnishment is that a judgment creditor cannot recover against the insurer if the insurer himself could not have recovered upon the insurance contract. *Schneider* v. *Antoist Mut. Ins. Co.*, 346 Ill. 137, 178 N.E. 466 (1931); *Jones* v. *Mfr's. Cas. Ins. Co.*, 313 Ill. App. 386, 40 N.E.2d 545 (1942). Moreover, the Illinois Insurance Code, Ill. Rev. Stat. ch. 73 ¶ 1000, specifically provides that recovery by an injured person in a direct suit against the insurer under the terms of the policy is "subject to all the conditions thereof." The terms of the policy issued to Serafine specify that "The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and

trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." The policy further provides that "No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this Policy. . . ."

The evidence shows that Serafine did not cooperate with the lawyers furnished by Aetna in the defense against DeRosa's claim. His failure, without acceptable excuse, to attend the trial until he appeared in response to DeRosa's subpoena, could only result in serious prejudice to the defense efforts furnished by Aetna. This conduct materially breached the condition in the policy requiring Serafine to attend the trial and assist in conduct of the defense. This breach precludes recovery by DeRosa whether it be sought under the policy, under the insurance code, or by way of garnishment.

DeRosa urges that even though it be determined that Serafine failed to cooperate with his insurer, Aetna waived this defense by reason of its continuing to defend the action with knowledge of Serafine's conduct. We do not agree. When an insured does not appear at trial, his insurer need not withdraw in order to preserve its defense of noncooperation. *Durbin for Use of Ferdman* v. *Lord,* 329 Ill. App. 333, 68 N.E.2d 537 (1946). This rule is logical and reasonable. Without it, the insurer would be required to elect at its peril to proceed with the defense or to withdraw. If the insurer should decide to withdraw and if there should be a later determination that there was no failure to cooperate, the insurer would be without means to defend on the merits the principal suit against its insured. By proceeding to trial, Aetna did not waive a valid defense against its insured. That defense is equally effective to defeat a claim by a third party as it would be to defeat a claim by the insured himself.

The judgment of the district court is reversed.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Swygert's opinion that the judgment of the district court should be reversed. In the absence of Serafine's explanation why he failed to appear when requested by defense attorney representing him in the Superior Court, the District Court's implied finding against Aetna on the issue of failure to cooperate is clearly erroneous. And DeRosa had the burden of going forward with any explanatory testimony in view of the testimony for Aetna.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Monday, May 24, 1965

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

FRANCIS DEROSA,
Counter-Plaintiff, Appellee,
No. 14757 v.
AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois, 60610

Tuesday, July 6, 1965

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

FRANCIS DEROSA,
Counter-Plaintiff, Appellee,

No. 14757 v.

AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause filed by appellee be, and the same is hereby, Denied.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

FRANCIS DEROSA,
Petitioner
v.
AETNA INSURANCE COMPANY

Order Extending Time To File Petition For Writ Of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3rd, 1965

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of October, 1965

RULE 52(a)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

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OCTOBER TERM, 1965.

No. 721

FRANCIS DeROSA,
Counter-Plaintiff, Petitioner,

vs.

AETNA INSURANCE COMPANY,
Counter-Defendant, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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PAGE

INDEX.

PAGE

Questions Presented 1

Statement of the Case 2

Argument 6

Conclusion 11

CASES CITED.

Allstate Insurance Co. v. Keller, 17 Ill. App. 2d 44, 149 N. E. 2d 482 (1958) 9

Cameron v. Berger, 132 Pa. Super. 484, 1 A. 2d 529, 533 (1938) 6

Century Indemnity Co. v. Serafine, 311 F. 2d 676 (CA 7 Ill. 1963) 3, 7, 10

Eakle v. Hayes, 185 Wash. 520, 55 P. 2d 1072, 1073 (1936) 6

Fischer v. Western & Southern Indemnity Co., 233 Mo. App. 885, 106 S. W. 2d 490, 494 (1937) 6

Glen Falls Indemnity Co v. Keliher, 88 N. H. 253, 187 A. 473, 476 (1936) 6

Indemnity Insurance Co. v. Smith, 197 Md. 160, 164, 78 A. 2d 461 (1951) 6

Maryland Casualty Co. v. Hallett, 295 F. 2d 64, 72 (CA 5 Fla. 1961) 6

Muthart v. Burik, 327 Ill. App. 170, 63 N. E. 2d 635, 640 (1945) 6

Oda v. Highway Insurance Co., 44 Ill. App. 2d 235, 194 N. E. 2d 489 (1963) 8

Pawlick v. State Farm Mutual Automobile Insurance Co., 302 F. 2d 255, 257 (CA 7 Ill. 1962) .....

Royal Indemnity Co. v. Rexford, 197 F. 2d 83 (CA 5 Fla. 1952) .....

Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 628 (CA 10 Okla. 1942) .....

STATUTE CITED.

Illinois Insurance Code (Ill. Rev. Stat. 1963, ch. 73, para. 1000) .....

IN THE

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OCTOBER TERM, 1965.

No. 721.

FRANCIS DeROSA,
Counter-Plaintiff, Petitioner,

vs.

AETNA INSURANCE COMPANY,
Counter-Defendant, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Is the insured released from the condition in his contract obligating him to assist and cooperate with his insurance company in the trial of a personal injury claim against him by reason of the fact that the insurance company, before the trial, had sought adjudication of the question of whether the insurance company was given timely notice of the injury?

2. May an insured accept the services of lawyers furnished by the insurer and allow them to file their appearance and later refuse or fail to comply with a request that he attend the trial of the action because the request was made by these lawyers?

STATEMENT OF THE CASE.

Petitioner's statement of the case contains gratuitous self-serving statements. Fortunately the opinion of the Court of Appeals, Appendix to Petition, 1a-5a, contains a complete and plain statement of the facts and issues in this case. In addition, we offer this supplementary statement.

There are three parties concerned in this litigation:

1. Aetna Insurance Company, which has taken over the Century Indemnity Company, hereinafter called Aetna.

2. Dan Serafine, policy holder of Century Indemnity Company, hereinafter called Serafine.

3. Francis DeRosa, who claimed personal injury while riding a horse owned by Serafine, hereinafter called DeRosa.

By forwarding to Aetna's predecessor on *March 3, 1959* the summons served upon him in a state court case #58 S 20672, Serafine, for the first time, notified Aetna that DeRosa was asserting a claim against him for personal injuries alleged to have been received while riding a horse owned by Serafine on *March 20, 1957* (later this date was changed to November 20, 1957). Two days after receiving the summons the company notified Serafine it would not defend him because of the late notice.

Aetna's predecessor then filed a suit (not the present one but an earlier declaratory judgment suit) in the United States District Court (Case #59 C 834), against Serafine and DeRosa, contending that it should not have to defend the state court suit or pay DeRosa's claim because the notice was untimely. The declaratory judgment case was tried, and the District Court entered judgment against Aetna and ordered it, in substance, to defend the case and pay any judgment that might be rendered in the state

court. The judgment was affirmed by the Court of Appeals. *Century Indemnity Company* v. *Serafine*, 311 F. 2d 676 (CA 7 Ill. 1963).

Following this declaratory action Aetna undertook the defense of the personal injury case in the state court.

On May 27, 1963, William E. Rattner, a lawyer of the law firm defending Serafine in the state court suit under the policy with Aetna, notified Serafine that the case was going to trial and asked him to attend. Serafine stated that he could not come to the trial; that he was going to Lake Geneva, Wisconsin (A. 170). Serafine further told Rattner that if he wanted to discuss the matter, to talk to Martin Silverman, Serafine's personal attorney (A. 170). The phone call to Silverman, the evidence shows, did not obtain Serafine's cooperation or attendance (A. 169, 180, 181).

DeRosa's case against Serafine was assigned for trial on May 28, 1963. Evidence began on May 29th. The first witness for the plaintiff DeRosa was the said Martin Silverman, the defendant's personal attorney. Silverman testified to his recollection of alleged admissions made by Serafine in the declaratory judgment action in the District Court. Serafine did not attend the trial or communicate with the lawyers furnished by Aetna to defend him until he appeared in the court room on the morning of June 3, 1963, in the company of DeRosa's attorney (A. 180, 181, 215). Serafine then became the last witness for DeRosa.

DeRosa, in the personal injury case, recovered a judgment for $25,000.00 against Serafine.

Thereafter Aetna filed this suit (a second declaratory judgment suit) in the District Court against Serafine and DeRosa, seeking a judgment that it be absolved from all liability under its policy because of Serafine's failure to cooperate in the trial of the case in the state court. In

answer to DeRosa's interrogatories, Aetna detailed in 24 pages Serafine's lack of cooperation, including his failure to attend the personal injury trial, and the particulars of why it was prejudiced (A. 55-79).

DeRosa moved to dismiss the suit on the ground that the issue was *res judicata,* and on the further ground that the granting of a declaratory judgment was in the discretion of the court, and that all issues between the parties could be tried in a garnishment action against Aetna by DeRosa (A. 24-28). Serafine filed a similar motion (A. 26). The court granted these motions (A. 48).

At the same time, DeRosa filed, by way of counterclaim, the instant case, which was for garnishment, for recovery under the Illinois Insurance Code (Ill. Rev. Stat., 1963, ch. 73, para. 1000), or for recovery under the terms of the policy (A. 40). At the trial in the District Court DeRosa offered the insurance policy and rested (A. 144, 145). Aetna proved that Serafine was requested to attend the trial, and that he failed to appear, or even communicate with the lawyers defending him, until a week after he was notified. DeRosa offered no rebuttal (A. 216).

It is to be noted that the position of DeRosa in the District Court was "Dan Serafine complied with all the terms and conditions of the policy of insurance issued to him by the Century Indemnity Company" (A. 41). There was no explanation offered in the District Court for Serafine's failure to attend the personal injury trial; no claim that Aetna had waived its right to insist on the cooperation of Serafine.

DeRosa repeatedly contended in the District Court that Aetna's claim of Serafine's lack of cooperation could not bar DeRosa's counterclaim because the issue was *res judicata* and had been adversely decided against Aetna in the first declaratory judgment suit (A. 37 with reference to A. 5, 6; A. 86-88, 89-121, 157, 193, 194), and that Aetna's

complaints of Serafine's failure to cooperate were an attempt to get the District Court to retry the state court personal injury suit (A. 148-150).

It was Aetna's position in the District Court that Serafine as well as Aetna continued to be bound by his policy after the first declaratory judgment, and that Serafine's lack of cooperation in the personal injury trial was available to Aetna as a defense to DeRosa's counterclaim.

In the Court of Appeals DeRosa conceded that Aetna's position on the matter of *res judicata* was correct.

The Court of Appeals decided:

1. That the policy issued to Serafine had as a condition: "the Insured shall cooperate with the Company and upon the Company's request, shall attend hearings and trials".

2. The failure of Serafine "without acceptable excuse" to attend the trial was a material breach of the condition in the policy, which prejudiced Aetna's attempts to defend him.

3. This breach precluded recovery by DeRosa under the terms of the policy, under the provisions of the Illinois Insurance Code, and under the case law of garnishment.

ARGUMENT.

The Court of Appeals considered all of the relevant facts presented in the lengthy appendix and additional appendix. The opinion filed by the Court discussed and resolved all of the material issues in the case.

Serafine's policy required him to assist and cooperate with his insurance company in defending claims against him, and expressly obligated him to attend hearings and trials upon the company's request. Case law uniformly interprets this condition as material to the entire contract of insurance. *Royal Indemnity Co.* v. *Rexford,* 197 F. 2d 83 (CA 5 Fla. 1952). The opinion in that case quotes from the following: *Indemnity Insurance Co.* v. *Smith,* 197 Md. 160, 164, 78 A. 2d 461 (1951); *Cameron* v. *Berger,* 132 Pa. Super. 484, 1 A. 2d 529, 533 (1938); *Fischer* v. *Western & Southern Indemnity Co.,* 233 Mo. App. 885, 106 S. W. 2d 490, 494 (1937); *Eakle* v. *Hayes,* 185 Wash. 520, 55 P. 2d 1072, 1073 (1936); *Glen Falls Indemnity Co.* v. *Keliher,* 88 N. H. 253, 187 A. 473, 476 (1936). The following is from *Glen Falls Indemnity Co.* v. *Keliher*:

> "Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial."

If there was any excuse for Serafine's failure to attend the personal injury trial as requested, the burden of explanation was on DeRosa. *Pawlik* v. *State Farm Mutual Automobile Insurance Co.,* 302 F. 2d 255, 257 (CA 7 Ill. 1962); *Maryland Casualty Co.* v. *Hallett,* 295 F. 2d 64, 72 (CA 5 Fla. 1961); *Muthart* v. *Burik,* 327 Ill. App. 170, 63 N. E. 2d 635, 640 (1945). DeRosa offered no evidence of

why Serafine absented himself from the personal injury trial, but still argues, Petition 7, that the Court of Appeals "has failed to give effect to the many explanations in the record for any apparent failure of the insured to cooperate". Below we shall show that the argued "explanations" are without merit, and that the Court of Appeals was right in holding that Serafine's failure to attend the trial was "without reasonable excuse".

I.

The first reason assigned for granting the writ of certiorari is: Serafine did not owe Aetna a duty to cooperate with it in the defense of DeRosa's claim against him because Aetna filed a declaratory action which raised the question of timely notice before it undertook the defense of the personal injury case.

Aetna had complained that the first notice given it of DeRosa's alleged injury or claim was nearly two years after the event. This issue was decided against Aetna by the District Court and by the Court of Appeals in *Century Indemnity Company* v. *Serafine,* 311 F. 2d 676 (CA 7 Ill. 1963). Thereafter, by the written stipulation of Serafine's personal attorneys, the lawyers furnished by Aetna entered their appearance and undertook the defense of the personal injury case (A. 224).

It does not seem reasonable that Serafine should, with the advice of personal attorneys, accept the benefit of their services and then assert that he had a right to refuse to attend the trial of the case because the request to do so came from these lawyers. Aetna was not guilty of any bad faith in its relationship with Serafine. A controversy, openly and fairly carried on between the insurer and its insured is not bad faith, especially where the insured is represented throughout by a personal attorney.

DeRosa's assertion here that Aetna's attorneys did nothing in preparation for trial of the personal injury case just is not so. No proof was made of such contention; no prejudice was shown. The record is that Serafine's personal attorneys were advising him throughout this litigation. It is undisputed that when the lawyers defending him telephoned Serafine, requesting his attendance at the coming trial, they were referred by Serafine to Martin Silverman, one of his personal attorneys. Silverman attended the trial and indeed testified for DeRosa. Can petitioner then say that some subjective reluctance of Serafine, even with the advice of a personal attorney, was legal justification for ignoring the request of Aetna that he attend and assist at the personal injury trial?

Illinois law on this subject is plain. A recent case, *Oda* v. *Highway Insurance Co.*, 44 Ill. App. 2d 235, 194 N. E. 2d 489 (1963), on the reciprocal duties of insurer and insured, observes, p. 245:

> "Where, however, a conflict of interest arises between the insurer and the insured, each owes a duty to respect the rights and interests of the other and to approach the common problem 'realistically with open hands and without concealed weapons.' *Traders & General Insurance Co.* v. *Rudco Oil & Gas Co.*, 129 F. 2d 621, 628 (Okla., 1942). Both the insured and the insurer had a responsibility. Neither could stand by and observe the course of the proceedings and then, after an unfavorable result, for the first time complain of the nature of the defense. . . ."

The attorneys furnished by Aetna were defending a personal injury case for Serafine with the consent of Serafine and his attorneys. They were entitled to Serafine's assistance and cooperation.

II.

It is argued that there was a conflict of interest between Aetna and Serafine; therefore the same attorneys should not have represented both. This charge is technical and not real. Of course, during the first declaratory suit the positions of Aetna and Serafine were antagonistic. In that case Serafine was represented by personal counsel. After the decision in this first declaratory suit ordering Aetna to defend Serafine, Aetna furnished attorneys who filed their appearance in a substitution signed by Serafine's personal attorneys. Thereafter, in the personal injury case in the state court, Aetna, having been ordered not only to defend the personal injury case, but to pay any judgment, had no interest inimical to Serafine. This was true until the very moment of the denial of the motion for a new trial.

Petitioner uses the epithet "bitterly antagonistic", but makes no reference to the record to support this language or to show that there was any conflict of interest on Aetna's part, to the prejudice of Serafine, in the defense of the personal injury case, by reason of inadequacy of coverage or any other matter.

Petitioner quotes from *Allstate Insurance Co.* v. *Keller*, 17 Ill. App. 2d 44, 149 N. E. 2d 482 (1958). Aetna has no quarrel with the decision and reasoning of the *Keller* case, but the facts have no resemblance to the instant case at all. In the *Keller* case the insurance company continued a confidential relationship with its insured, in order to make use of this relationship to build a defense for the insurer against the insured. Over a long period of time knowledge of the adverse position was withheld from the insured. Nor did he have the assistance of a personal attorney. In the instant case the insurance company promptly, two days after receiving the state court sum-

mons, its first notice of the claimed injury, notified Serafine's personal attorneys that because of late notice it was denying liability under its policy and would not defend him [Recited in opinion, *Century Indemnity Company* v. *Serafine,* 311 Fed. 2d 676, 678 (CA 7 Ill. 1963)].

Having quoted the court's very just denunciation of the wrongful conduct of the attorneys in the *Keller* case in taking over control of the defense meanwhile withholding from the insured the fact that the insurer was going to deny liability, petitioner hopes that this censure will in some way carry to attorneys furnished by Aetna. One thing is plain, Aetna and the attorneys furnished by Aetna never concealed from Serafine their decisions or their intentions. It is preposterous to charge Aetna with responsibility for Serafine's failure to attend the state court trial. The bad faith is Serafine's. His arrival in the courtroom at the state court trial with DeRosa's attorney and his own private attorney (A. 180) without any advance communication during the trial to the attorneys furnished to defend him is not the doing of Aetna.

At page 6 petitioner seeks to justify Serafine's failure to attend the personal injury trial when requested, by arguing "Serafine's reluctance to comply with any request of these attorneys". This is strange reasoning. The record shows that upon being requested to assist at the coming trial, Serafine told the caller to get in touch with Serafine's personal attorney (A. 170). Serafine's personal attorney was at the trial. It is preposterous to argue Serafine's "reluctance to comply with any request of these attorneys", when he had his personal attorney to act as intermediary. Can Serafine agree to the substitution of "these attorneys" and give them the duty to defend him if he is somehow unable to comply with their reasonable requests?

Yet this court is asked to review the decision of the

Court of Appeals because its opinion did not dwell at length on the subject, when it rejected the argument that this trivial speculation about Serafine's "reluctance", unsupported by evidence, might constitute a legal excuse for Serafine's unexplained breach of the condition of his contract. When the opinion uses the expression "without acceptable excuse" to characterize this contention, the Court makes clear that it has given due consideration to the excuse advanced. Need an opinion be as lengthy as the briefs?

CONCLUSION.

The reasons assigned by petitioner do not merit the granting of a writ of certiorari. Moreover, compelling grounds of public policy suggest that the Illinois law requiring a policy holder to attend the trial of an insured claim be not disturbed by this Court.

Respectfully submitted,

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